

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY
Employer

and

Case 13-RC-177943

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 73, CLC/CTW
Petitioner

DECISION ON REVIEW AND ORDER

On January 5, 2017, the Acting Regional Director for Region 13 issued a Decision and Order resolving challenged ballots. The Acting Regional Director adopted a hearing officer's decision to sustain challenges to 5 ballots, and he *sua sponte* sustained challenges to 31 additional ballots. In all, the Acting Regional Director ruled that 36 employees were ineligible to vote. Thereafter, in accordance with the Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review, asking the Board to find that, contrary to the Acting Regional Director, 25 of these 36 employees were eligible to vote and their ballots should be opened and counted. The Petitioner filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the Employer's request for review, we find that the Acting Regional Director erred in his resolution of the 25 challenged ballots for which the Employer has requested review. More specifically, we find, first, that the parties' Stipulated Election Agreement unambiguously includes within the stipulated unit 18 of the 25 employees who cast

these ballots.¹ The Employer's human resources information system clearly demonstrates that these 18 employees held appointments in non-tenure eligible classifications unambiguously included within the stipulated unit and in those classifications only. In addition, we find that the ballots of the remaining 7 challenged voters also should be opened and counted. Although the stipulation is ambiguous as to these 7 employees and extrinsic evidence does not clarify the parties' intent, we find that these 7² should be included in the unit on community-of-interest grounds. Accordingly, we grant review, reverse the Acting Regional Director's decision to sustain the challenges to the ballots cast by these 25 employees, and order that their ballots be opened and counted.

I. Background

Pursuant to a Stipulated Election Agreement (Stipulation) approved by the Regional Director on June 20, 2016, the parties agreed to an election in a unit of the Employer's non-tenure eligible (NTE) faculty. The Stipulation specifically identified 19 classifications of NTE faculty that were included in the unit, including, among other classifications, Lecturers, Senior Lecturers, Distinguished Senior Lecturers, Assistant Professors of Instruction, Associate Professors of Instruction, and Professors of Instruction. The Stipulation further stated that NTE faculty in these classifications were eligible to vote if they (i) had taught at least one credit-bearing course in a degree-granting program at any one of seven of the Employer's constituent schools during the three preceding academic quarters, (ii) were employed by the Employer during the payroll period ending May 31, 2016, and (iii) had an active account in the Employer's

¹ The 18 are Stacy Benjamin, Denise Bouras, Santiago Canez, Chyi Chung, Emma De Costa, Elisabeth Elliott, Penny Hirsch, Nancy Hobor, Hong Jiang, Natalia Lyashenko, Martina Kerlova, Dominique Licops, Yanantali Mejia, Susan Piagentini, Ian Savage, Barbara Shwom, Stacia Spencer, and Mark Witte.

² The 7 are John Alongi, Catherine Carrigan, Gerald Chiaro, Gary Galbreath, Benjamin Gorvine, Christina Russin, and Noriko Yasohama.

human resource information system (HRIS) as of May 31, 2016.³ The Stipulation also set forth a number of specific exclusions from the stipulated unit, including “all administrators (including deans, directors, provosts, and chairs who may have teaching assignments), other administrators and staff who have teaching assignments . . . [and] all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching.”⁴

The election was conducted by mail ballot, and the revised tally of ballots, issued on August 11, 2016, showed 223 ballots cast for the Petitioner and 191 against, with 71 challenged ballots, a number sufficient to affect the results of the election.⁵ A hearing was held on the 71 challenged ballots, during which the parties agreed that one challenged voter was not eligible. In its post-hearing brief, the Petitioner conceded that another 14 voters it had challenged were eligible and requested withdrawal of its challenges to their ballots. In her report, the Hearing

³ Another name for the HRIS is the Faculty and Staff Information System (FASIS). HRIS/FASIS (hereafter FASIS) is an electronic database that contains personnel information on each employee, including his or her work location, compensation and payroll information, contract period, and—most saliently for our purposes—the classification or classifications to which the employee was appointed as of the payroll eligibility date.

⁴ Specifically, the stipulated unit excludes “[a]ll tenured faculty, tenure-eligible faculty, emeritus faculty, Postdoctoral Fellows, Visiting Postdocs, All Other Postdoctoral Job Classifications, Visiting Faculty, Visiting Lecturers, Visiting Scholars, Visiting Associate Professors, Visiting Professors, Research Assistant Professors, Research Associate Professors, Research Professors, faculty in non-degree granting programs, the Feinberg School of Medicine faculty, the Pritzker Law School faculty, the Kellogg School of Business faculty, the School for Professional Studies faculty, Northwestern in Qatar faculty, all faculty teaching only at the Chicago or Doha campuses, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments), other administrators and staff who have teaching assignments, faculty who are paid directly or indirectly by other entities including governments, other academic institutions and other organizations, graduate students, athletic coaches, all other employees employed at the University, including those who teach a class or course and are separately compensated for such teaching, managers, confidential employees, office clerical employees, and guards and supervisors as defined in the Act.”

⁵The initial tally of ballots was issued on July 19, 2016, but the parties subsequently resolved a number of challenges, agreeing that 5 should be sustained and that 58 challenged ballots should be opened and counted. There were also 4 void ballots.

Officer recommended approving the Petitioner's request to withdraw 14 challenges, sustaining the challenges to 17 ballots, and overruling the remaining 39 challenges.⁶ The Employer filed exceptions regarding 6 of the challenges the Hearing Officer sustained. On January 5, 2017, the Acting Regional Director issued his Decision and Order. He adopted the Hearing Officer's recommendation to approve the Petitioner's request to withdraw 14 challenges. He then went beyond the 6 ballots the Employer presented on exceptions and re-evaluated all 56 ballots considered by the Hearing Officer, sustaining challenges to 36 of them and overruling the other 20. Thereafter, the Employer filed a timely request for review concerning 25 of the challenges the Acting Regional Director had sustained.⁷ The Petitioner filed an opposition. The Region subsequently counted the 34 ballots that were not subject to the request for review and, on May 12, 2017, issued a second revised tally of ballots, showing 229 votes for and 219 against representation, and noting that 25 challenged ballots (those subject to the Employer's request for review) remain "unresolved." Accordingly, the 25 ballots as to which the Employer has requested review remain dispositive.⁸

⁶ Of the challenges the Hearing Officer recommended be sustained, 11 had been made by the Petitioner and 6 by the Employer. All the challenges the Hearing Officer recommended be overruled had been made by the Petitioner.

⁷ The 25 challenged ballots in question include 4 that the Hearing Officer recommended sustaining (those cast by Alongi, Chiaro, Galbreath, and Yasohama) and 21 that the Hearing Officer recommended overruling (those cast by Benjamin, Bouras, Canez, Carrigan, Chung, De Costa, Elliott, Gorvine, Hirsch, Hobor, Jiang, Kerlova, Licops, Lyashenko, Mejia, Piagentini, Russin, Savage, Shwom, Spencer, and Witte).

⁸ Notwithstanding that the status of a determinative number of ballots remained unresolved, on May 26, 2017, the Acting Regional Director issued a Supplemental Decision and Certification of Representative, which briefly described the foregoing procedural events and certified the Union as representative of the unit employees. The Employer subsequently filed a request to stay the certification. Our order in this proceeding vacates that certification and directs the Regional Director to open and count 25 ballots, serve on the parties a revised tally of ballots, and issue the appropriate certification. Accordingly, we find it unnecessary to address the Employer's request to stay the now-vacated certification.

II. Analysis

A. The Applicable Standard

When an election is conducted pursuant to a stipulated election agreement, the Board applies the three-step test set forth in *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002), to determine whether a challenged voter is properly included in or excluded from a stipulated unit. Under this test, the Board first determines whether the stipulation is ambiguous with regard to the inclusion of the challenged voter. If the objective intent of the parties is clearly and unambiguously expressed in the stipulation, the Board simply enforces the agreement as written. The Board assesses the clarity of the stipulated election agreement by comparing the express language of the agreement with the classifications at issue to determine whether they match. *Los Angeles Water and Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003). “The Board will find that the parties have ‘a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.’” *Id.* (quoting *Northwest Community Hospital*, 331 NLRB 307 (2000)). In other words, at the first step of *Caesars Tahoe*, “the Board will compare the express descriptive language of the stipulation with the bona fide titles . . . of the affected employee. If the employee’s title fits the

Having vacated the certification of representative, Chairman Ring agrees that it is unnecessary to address the Employer’s request for a stay. He also recognizes that the Board’s rules permit regional directors to issue a certification of representative at a time when contested issues in the representation case may remain pending before the Board on a request for review, as happened here. See Board’s Rules & Regulations Sec. 102.69(c)(2). And he observes that the employer’s duty to bargain on request attaches with the issuance of the certification of representative. See, e.g., *Howard Plating Industries, Inc.*, 230 NLRB 178 (1977). In other words, the union may be certified, and the duty to bargain may attach, before the results of the election are final. Chairman Ring also notes, however, that Sec. 3(b) of the Act empowers the Board to stay any action by a regional director. In light of the problems that may be created by the issuance of a certification while contested election issues remain unresolved, the Chairman believes that the Board should look with favor on requests to stay certifications in these circumstances.

descriptive language, the Board will find a clear expression of intent and include the employee in the unit.” *Viacom Cablevision*, 268 NLRB 633, 633 (1984). Finally, “where the stipulation specifically enumerates the job classifications that are included in the unit, the classification at issue is not among them, and there is an exclusion for ‘all other employees,’ the stipulation will be read to clearly exclude that classification.” *Los Angeles Water & Power Employees’ Assn.*, above (internal quotations omitted).

If, however, the stipulation is ambiguous, the Board attempts to determine the parties’ intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties’ intent still cannot be discerned, the Board proceeds to step three and determines whether the challenged voters are included in or excluded from the unit by applying its standard community-of-interest test. *Caesars Tahoe*, above; *CVS Albany, LLC*, 364 NLRB No. 21, slip op. at 1-2 (2016). The Board places the burden of proof on the party asserting that a challenged voter is ineligible to vote. *Goucher College*, 364 NLRB No. 71, slip op. at 2 (2016); *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007).

B. Application of *Caesars Tahoe* to the Stipulation

1. The Stipulation unambiguously includes 18 of the 25 challenged voters.

At step one of *Caesars Tahoe*, the Acting Regional Director found that the Stipulation was ambiguous as to all 25 challenged voters because they each held “other compensated positions.” We disagree with this finding. A review of payroll documentation, specifically the

payroll information located in FASIS, demonstrates that 18 of the 25 challenged voters⁹ held only appointments to NTE classifications unambiguously included within the stipulated unit.¹⁰

Both the Petitioner and the Employer argue that the Stipulation is unambiguous and unambiguously supports their contrary positions. The Petitioner asserts that, under the Stipulation's exclusion of "all other employees," the parties plainly intended to exclude any employees who held any titles not covered by the Stipulation even if those employees also held titles included within the stipulated unit. Since there is some evidence that each of the 25 challenged employees hold additional titles, the Petitioner argues, they are excluded from the unit. By contrast, the Employer contends that the clear intent of the Stipulation was to include NTE faculty "with a predominant teaching role" even if they also perform other "ancillary service duties" and to exclude individuals "whose primary relationship to the [Employer] is something other than" an NTE teaching position, even if they also teach on occasion. Since the predominant classifications of all 25 challenged employees were NTE classifications expressly included within the stipulated unit, the Employer argues, the Stipulation unambiguously includes them. Rejecting the positions of both parties, the Acting Regional Director found that the Stipulation was ambiguous. The Acting Regional Director reasoned that, although the Stipulation "unambiguously includes" NTE employees, "the language of the stipulation does not clearly address whether the disputed classification of 'all full-time and part-time graduate and undergraduate non-tenure eligible faculty who also hold other compensated positions' is specifically included or excluded from the unit." In finding the Stipulation ambiguous, the

⁹ Benjamin, Bouras, Canez, Chung, De Costa, Elliott, Hirsch, Hobor, Jiang, Kerlova, Licops, Lyashenko, Mejia, Piagentini, Savage, Shwom, Spencer, and Witte.

¹⁰ During the relevant time frame, 4 of these 18 voters held two simultaneous appointments to included NTE classifications: Hirsch held two appointments as a Professor of Instruction, Kerlova held two appointments as an Assistant Professor of Instruction, Lyashenko held two appointments as a Lecturer, and Savage held two appointments as a Professor of Instruction.

Acting Regional Director also noted that the parties had “differing interpretations” of the Stipulation’s application to the 25 challenged voters.

As noted above, to determine whether a stipulation is unambiguous as to a challenged voter, the Board will compare the express language of the stipulation with that voter’s classification. The flaw in the Acting Regional Director’s reasoning is his premise that “all full-time and part-time graduate and undergraduate non–tenure eligible faculty who also hold other compensated positions” is a classification. It is not. Rather, as stated above, the classifications expressly included within the stipulated unit are the 19 classifications of NTE faculty set forth in the Stipulation. It is undisputed that each of the 25 challenged voters holds an NTE faculty appointment in one of these 19 classifications. Clearly, therefore, each of the 25 challenged voters holds an appointment that matches a classification in the Stipulation.

It would appear that the *Caesars Tahoe* analysis as to all 25 disputed voters ends there. However, the Stipulation also clearly excludes, most pertinently, “all administrators (including deans, directors, provosts, and chairs who may have teaching assignments), other administrators and staff who have teaching assignments . . . [and] all other employees employed at the University, including those who teach a class or course and are separately compensated for such teaching.” And there is some evidence, discussed below, that each of the 25 challenged voters also holds either a specifically excluded position or another position not specifically included in the unit. For the reasons that follow, however, we find this evidence insufficient to render the Stipulation ambiguous with regard to 18 of the 25 challenged voters.

Again, at the first step of the *Caesars Tahoe* analysis, the Board compares “the express descriptive language of the stipulation with the bona fide titles . . . of the affected employee. If the employee’s title fits the descriptive language, the Board will find a clear expression of intent

and include the employee in the unit.” *Viacom Cablevision*, 268 NLRB at 633. We evaluate the challenged employees’ “bona fide titles” by reviewing the information regarding each employee contained in FASIS, the electronic database that serves as the central repository for the Employer’s payroll information. The centrality of FASIS to the question of each employee’s bona fide title is demonstrated by the Stipulation itself, which states that, to be eligible to vote, an employee must be active in FASIS as of May 31, 2016.¹¹ For 18 employees, FASIS shows only appointments to NTE classifications expressly included within the stipulated unit.¹² Accordingly, we find that the Stipulation unambiguously includes them, and they are therefore eligible to vote.

In finding to the contrary, the Acting Regional Director relied on evidence outside of FASIS: testimony by administrators and/or the employees’ appointment letters.¹³ Based on this evidence, the Acting Regional Director found that each of the 18 employees held one or more titles not named as classifications expressly included within the stipulated unit.¹⁴ Again,

¹¹ According to the testimony of Monica Russel y Rodriguez, the associate dean who oversees NTE faculty, the “HRIS system” referenced in the Stipulation is another name for FASIS.

¹² Benjamin, Senior Lecturer; Bouras, Assistant Professor of Instruction; Canez, Professor of Instruction; Chung, Distinguished Senior Lecturer; De Costa, Lecturer; Elliott, Associate Professor of Instruction; Hirsch, Professor of Instruction; Hobor, Senior Lecturer; Jiang, Associate Professor of Instruction; Kerlova, Assistant Professor of Instruction; Licops, Associate Professor of Instruction; Lyashenko, Lecturer; Mejia, Lecturer; Piagentini, Senior Lecturer; Savage, Professor of Instruction; Shwom, Professor of Instruction; Spencer, Senior Lecturer; Witte, Professor of Instruction. As noted above, FASIS lists Hirsch, Kerlova, Lyashenko, and Savage as each holding two appointments in the same NTE classification.

¹³ The Acting Regional Director did not, however, rely on the titles in the employee biographies placed on the Employer’s website. As noted by both the Hearing Officer and the Acting Regional Director, these biographies were mostly composed by the employees themselves with little or no review or editing by any supervisor or administrator. The Acting Regional Director did not credit these biographies, and no party has relevantly requested review. We agree with the Acting Regional Director that these biographies are entitled to little if any probative weight.

¹⁴ Benjamin, Advisor for the Segal Design Certificate program; Bouras, Assistant Director for the Spanish language program; Canez, co-director or co-coordinator for calculus; Chung, director of Spanish language program; De Costa, advisor within the Undergraduate Engineering

however, FASIS is the Employer’s central repository of payroll information, and these additional titles are not contained in FASIS. Moreover, the Stipulation itself accords FASIS privileged status by conditioning voter eligibility with reference to FASIS. These facts serve as a clear indication that the Board may look to FASIS to ascertain the challenged voters’ “bona fide titles.” *Id.* Accordingly, we find that titles not contained in FASIS should not be deemed bona fide titles for purposes of the *Caesars Tahoe* analysis.

Even considering the extra-FASIS evidence the Acting Regional Director relied upon, we conclude that this evidence is insufficient to sustain the Petitioner’s burden of demonstrating that the 18 employees should be excluded from the stipulated unit. For 11 of these 18 employees—Benjamin, Bouras, Canez, Chung, Hirsch, Hobor, Jiang, Kerlova, Licops, Shwom, and Witte—no other documentation demonstrates they held any title in addition to the classification named in FASIS. Rather, their appointment letters, like the record of their appointments in FASIS, name only NTE classifications included in the stipulated unit. The only evidence of these 11

Office in the McCormick School of Engineering and Applied Science; Elliott, coordination and supervision of Russian Language program and supervision of graduate students; Hirsch, Assistant or Associate Director in the Writing Program; Hobor, faculty advisor for the student-run Journal of Integrated Marketing Communications; Jiang, Coordinator in the Chinese language program; Kerlova, Director of Undergraduate Studies in the Department of Slavic Language & Literature; Licops, director of French language program; Lyashenko, Coordinator of the Voice Division; Mejia, Advisor within the Undergraduate Engineering Office in the McCormick School of Engineering and Applied Science; Piagentini, Coordinator of Freshman Theory and Aural Skill courses and curriculum; Savage, Associate Chair in the Department of Economics; Shwom, Director of the Writing Place; Spencer, Coordinator of the Strings Division of the Music Academy; Witte, director of undergraduate studies for economics.

In addition to their appointments to included NTE classifications, employees Canez, Chung, Licops, and Witte each held appointments—and were shown in FASIS as holding appointments—as faculty in the School for Professional Studies, a classification specifically excluded from the unit. However, the Hearing Officer found that he could not consider this evidence because no party argued that these four should be excluded from the unit on this basis. We agree. See, e.g., *J.K. Pulley Co.*, 338 NLRB 1152, 1153 (2003) (finding that where evidence regarding voter eligibility was not presented to the hearing officer, “the issue was not properly before the hearing officer, and . . . he erred by considering employee eligibility on that basis”).

employees' additional titles is the testimony of administrators, and this testimony, standing alone, does not carry the Petitioner's burden of proof to exclude them from the unit. To the contrary, these administrators testified that the assignment of other tasks and titles is often part and parcel of an NTE appointment. For example, Russel y Rodriguez, an associate dean who oversees NTE faculty, testified that when a department assigns an employee particular tasks or functions, it can also assign a title related to those tasks. This testimony does not demonstrate that such titles—and the duties that accompany them—are distinct from these employees' NTE classifications. Rather, such titles designate duties that have been assigned to these employees as a component of their NTE classification. Because the documentary evidence demonstrates that Benjamin, Bouras, Canez, Chung, Hirsch, Hobor, Jiang, Kerlova, Licops, Shwom, and Witte have only an appointment to an NTE classification that matches a classification expressly included in the Stipulation, we find that they are unambiguously included within the stipulated unit, and the Petitioner did not meet its burden to exclude them.

The situation is similar for another 6 of the 18 employees—De Costa, Elliott, Mejia, Piagentini, Savage, and Spencer—who hold only NTE appointments in FASIS. The appointment letters of these six employees do reference additional duties and/or titles. However, each of these appointment letters also shares a similar structure, stating first that the employee has been appointed to an NTE classification (one that is included within the stipulated unit) and then listing additional duties and/or titles ancillary to that appointment.

Thus, the appointment letters of De Costa and Mejia state that they have been appointed as a Lecturer, an included NTE classification, and have been assigned, as part of that appointment, to serve as a “freshman advisor,” a position neither specifically included in nor specifically excluded from the stipulated unit—and the Stipulation does state an exclusion for

“all other employees employed at the University.” This does not render the Stipulation ambiguous as to De Costa and Mejia, however. Again, “where the stipulation specifically enumerates the job classifications that are included in the unit, *the classification at issue is not among them*, and there is an exclusion for ‘all other employees,’ the stipulation will be read to clearly exclude that classification.” *Los Angeles Water & Power Employees’ Assn.*, above. Here, however, “the classification at issue”—the Lecturer position to which De Costa and Mejia were appointed, as shown in FASIS and stated in their appointment letters—is specifically enumerated in the Stipulation as an included classification.¹⁵ De Costa’s and Mejia’s appointment letters confirm that acting as a “freshman advisor” is merely a duty of the included Lecturer appointment. Thus, we find that the Petitioner did not carry its burden of demonstrating that DeCosta and Mejia are excluded from the unit.

Similarly, the appointment letter of Elliott states that her appointment as an Associate Professor of Instruction, an included NTE classification, will include non-classroom duties that will “likely comprise coordination and supervision of the undergraduate Russian language program and supervision of graduate assistants and their training in pedagogy.” Thus, the record evidence demonstrates that Elliott holds only one appointment, to the included NTE classification “Professor of Instruction,” and her further duties within the Russian language program are merely an aspect of that appointment.

Piagentini’s and Spencer’s appointment letters support the same conclusion. Piagentini’s appointment letter states that her responsibilities as Senior Lecturer, an included NTE classification, will include serving as Coordinator of Freshman Theory and Aural Skills courses

¹⁵ By contrast, in *Los Angeles Water & Power*, the challenged employee’s title, “accountant,” was *not* among the classifications specifically enumerated in the stipulation, and there was an exclusion for “all other employees.”

and curriculum. Spencer's letter states that her responsibilities as Lecturer, an included NTE classification, include serving as Coordinator of the Strings Division in the Music Academy. Thus, while these appointment letters reference additional roles performed by Piagentini and Spencer, the letters clearly portray these roles as ancillary to their responsibilities as Senior Lecturer and Lecturer, respectively—NTE classifications unambiguously included in the unit.

Savage's appointment letter states he is being offered an "appointment as Professor of Instruction and Associate Chair in the Department of Economics." The Stipulation excludes "chairs" (but not associate chairs). However, the remainder of the letter refers to Savage's position in the singular, noting that his appointment as Professor of Instruction also "includes the performance of administrative duties as assigned by department chair." Furthermore, although FASIS indicates that Savage holds two appointments, both are as Professor of Instruction, an included classification. Because there is insufficient evidence to conclude that the Associate Chair position constituted an appointment separate from the NTE classification, we find that Savage is unambiguously included in the unit at step one of *Caesars Tahoe*.

For De Costa, Elliott, Mejia, Piagentini, Savage, and Spencer, then, their appointment letters bolster the conclusion to be drawn from FASIS: each of these six employees' "bona fide titles," *Viacom Cablevision*, 268 NLRB at 633, corresponds to an NTE classification expressly enumerated in the Stipulation as included within the unit. To the extent their appointment letters and testimony by administrators reference additional duties or titles, these are ancillary to the employees' appointment to a specifically included NTE classification.

Finally, we also find employee Lyashenko to be unambiguously included within the unit at step one of *Caesars Tahoe*. Lyashenko has two appointment letters, one for a clearly included NTE classification of Senior Lecturer, and the other for a position not expressly included within

the Stipulation, Coordinator of the Voice Division in the Music Academy. As with the foregoing employees, Lyashenko may not be excluded from the unit merely based on a letter stating that she holds a position as a Coordinator, since it is equally clear that she holds a position as a Senior Lecturer, an included NTE classification. Furthermore, while FASIS also shows Lyashenko as having two appointments, it classifies both as NTE Lecturer positions. Any tension between Lyashenko's FASIS record and the appointment letters is resolved by the testimony of administrator Rene Machado, an Associate Dean for Administration, Finance and Planning at the Bienen School of Music, who emphasized that although two letters were issued to Lyashenko, Lyashenko held only an appointment as a Lecturer. Machado's testimony that Lyashenko held only appointments in included NTE classifications is consistent with FASIS and further confirms that FASIS reflects an employee's bona fide title. Thus, we find that here, too, the evidence demonstrates that Lyashenko's bona fide title matches a classification expressly included in the stipulated unit, and the Petitioner has not carried its burden to exclude her.

In sum, for the reasons stated above, we find, at step one of the *Caesars Tahoe* analysis, that the Stipulation unambiguously includes the foregoing 18 employees within the stipulated unit. As to these 18, we therefore reverse the Acting Regional Director's decision and overrule the challenges to their ballots.

2. The remaining 7 employees are eligible to vote on community-of-interest grounds.

- a. The eligibility of the remaining 7 employees cannot be determined at step one of *Caesars Tahoe*.

Although the Stipulation unambiguously includes 18 of the 25 challenged employees, the eligibility of the remaining 7 challenged employees—Alongi, Carrigan, Chiaro, Galbreath, Gorvine, Russin, and Yasohama—cannot be resolved at step one of *Caesars Tahoe*. Like the 18

employees discussed above, each of these 7 held FASIS appointments to included NTE classifications. Unlike those 18, however, FASIS indicates that each of these 7 employees held at least one additional appointment either to an expressly excluded classification or to a classification neither expressly included nor expressly excluded, i.e., an unmentioned classification. Thus, FASIS reflects that five employees—Alongi, Chiaro, Galbreath, Russin, and Yasohama—hold both an appointment to an included NTE classification and an additional appointment as a “director” or “chair,” and the Stipulation specifically excludes “all administrators (including directors . . . and chairs who may have teaching assignments).” Employees Carrigan and Gorvine hold appointments as an “academic advisor” and a “master,” respectively. The positions of “academic advisor” and “master” are neither included in nor excluded from the stipulated unit, but they fall within the Stipulation’s exclusion of “all other employees.”

With regard to these 7 employees, the situation is similar to that in *Columbia College*, 346 NLRB 726 (2006). In that case, the Board considered the eligibility of part-time faculty who also performed a staff function as tutors, where the stipulated election agreement specifically included “staff” but specifically excluded “faculty.” The Board found that the exclusion of faculty was ambiguous, since it could “be read to apply to any faculty member, irrespective of whether that faculty member is a part-time employee, i.e., a tutor” or it “could reasonably be read to apply only to faculty members who are not part-time staff employees.” *Id.* at 728. Similarly here, the Stipulation could reasonably be read to apply to any NTE faculty member, regardless of whether that NTE faculty member also held an excluded appointment, or it could be read to exclude any employee with an appointment in an excluded classification, regardless of their appointment to an included NTE classification. Since FASIS demonstrates that each of these 7

employees hold appointments both included in and excluded from the Stipulation, we find that as to them, the Stipulation is ambiguous at step one of *Caesars Tahoe*.

- b. The ambiguity in the Stipulation as to the 7 remaining challenged voters cannot be resolved at step two of *Caesars Tahoe*.

Where a stipulation is ambiguous as to challenged voters, “the Board must seek to determine the parties’ intent through normal methods of contract interpretation, including the examination of extrinsic evidence.” *Caesars Tahoe*, above at 197. The Acting Regional Director correctly noted that “[t]here is limited extrinsic evidence in the record to assist in determining the intent of the parties.” We agree; the record does not reveal the content of the parties’ negotiations over the Stipulation or other evidence that would indicate the parties’ contemporaneous intent. Moreover, the parties’ intent cannot be determined through “normal methods of contract interpretation” because, as explained above, the Stipulation may be read to include any faculty member with an appointment to an included NTE classification, regardless of whether that employee also held an excluded appointment, or it could be read to exclude any employee with an appointment in an excluded classification, regardless of his or her appointment to an included NTE classification.¹⁶ Thus, the Stipulation is both clear as to whom it includes and clear as to whom it excludes, but it is entirely unclear, even employing normal methods of contract interpretation, how to resolve the eligibility of an employee who is both clearly included and clearly excluded. Accordingly, we will resolve the 7 remaining challenged ballots at step 3 of the *Caesars Tahoe* analysis.

- c. A community-of-interest analysis at step three of *Caesars Tahoe* demonstrates that the 7 remaining voters should be included within the unit.

¹⁶ Accordingly, we reject the Acting Regional Director’s finding that normal methods of contract interpretation yield the conclusion that NTE faculty holding a separate additional position are excluded from the unit.

Where the parties' intent as to challenged voters cannot be discerned either from the language of an unambiguous stipulation or through interpretation of an ambiguous stipulation (taking extrinsic evidence into consideration), "the Board determines the bargaining unit by employing its normal community-of-interest test." *Caesars Tahoe*, above at 197. We now perform this community-of-interest analysis to determine the eligibility of the remaining 7 voters who are appointed to positions both clearly included in and clearly excluded from the unit.

It is undisputed that each of the 7 remaining challenged voters holds an NTE position in a classification clearly included by the Stipulation, and thus each of the 7 shares some community of interest with the included employees. See, e.g., *NLRB v. Jolcin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir. 1963) (Regional Director "needlessly" disenfranchised a dual-function employee who held a classification within the unit where it was not shown that the employee lacked a sufficient interest with the unit). Where employees are dual-function,¹⁷ i.e., the employees hold both in-unit and out-of-unit positions, the Board will consider "whether the employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Martin Enterprises, Inc.*, 325 NLRB 714, 714 (1998). "[T]he Board has no bright line rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each particular case." *Id.* As a general guideline, however, the Board will find a substantial community of interest where a dual-function employee spends more than 25% of his or her time performing unit work. *WLVI Inc.*, 349 NLRB 683, 686 fn. 5 (2007). The Board also considers

¹⁷ Although the parties have claimed that the challenged employees' dual-function status is not at issue, we find this analysis necessary to determine whether these challenged voters share a sufficient community of interest with the unit employees to include them in the unit at step three of *Caesars Tahoe*.

the regularity with which the employee performs unit work. *Columbia College*, above at 729 fn. 10.

We find that each of the 7 remaining challenged employees is eligible to vote because each shares a substantial community of interest with the unit. FASIS indicates that the primary appointment of each of the 7 employees is to an NTE classification included within the stipulated unit. Furthermore, both FASIS and other record evidence indicate that each employee spends a sufficient amount of time performing unit work to be included within the unit. Alongi's appointment letter indicates that his primary appointment is to a full-time NTE Professor of Instruction position. While FASIS indicates that he also had an appointment as a program director, the testimony of administrator Russell Rodriguez established that his primary duties are as an NTE faculty member. The situation is similar for the other 6 employees at issue. The FASIS files for Carrigan, Chiaro, Galbreath, Gorvine, Russin, and Yasohama identify each employee's primary appointment as an NTE faculty position in an included classification. While the record indicates that these employees hold appointments to other positions, the totality of the evidence for each—including FASIS files, appointment letters, and administrator testimony—makes equally clear that their primary duties are those of an NTE faculty member. Even where the evidence demonstrates an employee has significant non-unit duties, this evidence does not indicate that the employees' non-unit duties were so encompassing as to negate the employee's shared community of interest with his or her fellow NTE faculty. For example, Galbreath's primary appointment is to the position of Distinguished Senior Lecturer. He also has an appointment as an Associate Academic Director in the Biological Sciences. While Russell Rodriguez testified that his Lecturer course load is reduced from 6 to 3 courses so he can perform his duties as Associate Academic Director, she also compared his position to that of

Alongi, who she testified is primarily an NTE faculty member. Russel y Rodriguez's testimony regarding Galbreath's duties confirms the conclusion to be drawn from his FASIS designation. While his duties as a Director are certainly consequential, his primary role is as an NTE faculty member in an included classification, and he therefore shares a sufficient community of interest with the unit.

In short, the evidence for each of these employees demonstrates that their primary appointment is to an included NTE classification. Thus, although these 7 employees hold additional, excluded appointments, their NTE position is their primary position, to the duties of which they devote a significant amount of time. We therefore find that Alongi, Carrigan, Chiaro, Galbreath, Gorvine, Russin, and Yasohama each "perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Martin Enterprises, Inc.*, above at 714. On this basis, we find that they are eligible to vote at step three of the *Caesars Tahoe* analysis.

For the foregoing reasons, we overrule all 25 challenges at issue in this case. Accordingly, we vacate the certification and remand the case to the Regional Director to open and count these ballots.

ORDER

The certification is vacated. It is directed that the Regional Director for Region 13 shall, as soon as practicable, open and count the ballots of John Alongi, Stacy Benjamin, Denise Bouras, Santiago Canez, Catherine Carrigan, Gerald Chiaro, Chyi Chung, Emma De Costa, Elisabeth Elliott, Gary Galbreath, Benjamin Gorvine, Penny Hirsch, Nancy Hobor, Hong Jiang, Martina Kerlova, Dominique Licops, Natalia Lyashenko, Yanantali Mejia, Susan Piagentini, Christina Russin, Ian Savage, Barbara Shwom, Stacia Spencer, Mark Witte, and Noriko

Yasohama. The Regional Director shall serve on the parties a revised tally of ballots and issue the appropriate certification.

JOHN F. RING,	CHAIRMAN
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LAUREN MCFERRAN,	MEMBER
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MARVIN E. KAPLAN,	MEMBER
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Dated, Washington, D.C., September 27, 2018.